

Mark L. Javitch
mark@javitchlawoffice.com
JAVITCH LAW OFFICE
3 East 3rd Ave. Ste. 200
San Mateo CA 94401
(650) 781-8000 telephone
(650) 648-0705 facsimile

Thomas A. Zimmerman, Jr. (admitted *pro hac vice*)
tom@attorneyzim.com
Sharon A. Harris (admitted *pro hac vice*)
sharon@attorneyzim.com
ZIMMERMAN LAW OFFICES, P.C.
77 W. Washington Street, Suite 1220
Chicago, Illinois 60602
(312) 440-0020 telephone
(312) 440-4180 facsimile
www.attorneyzim.com
firm@attorneyzim.com

Attorneys for Plaintiff and the Rule 23(c)(4) issue Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SHAWN LYNCH, on behalf of himself and all other persons similarly situated,)	Case No. 3:22-cv-03704-WHA
)	
Plaintiff,)	PLAINTIFF’S RESPONSE IN
)	OPPOSITION TO DEFENDANT
v.)	MATTERPORT INC.’S MOTION FOR
)	SUMMARY JUDGMENT
)	
MATTERPORT, INC., a Delaware)	District Judge William H. Alsup
corporation; RJ PITTMAN, DAVE)	Date: November 16, 2023
GAUSEBECK, MATT BELL, CARLOS)	Time: 8:00 a.m. P.S.T.
KOKRON, PETER HEBERT, JASON)	Courtroom: 12, 19 th Floor (in person hearing)
KRIKORIAN, and MIKE GUSTAFSON,)	
)	
Defendants.)	Class Action Complaint filed: March 28, 2022
)	Notice of Removal Filed: June 23, 2022
)	Trial date: December 11, 2023
)	
)	

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Matterport promoted its Matterport Service Partner (“MSP”) program to individuals with promises of “YOUR BUSINESS, YOUR WAY” and “Be your own boss, set your own hours, and earn what you want. For only \$4,100* in up-front investment and minimal training, you’ll be on your way to a lucrative, self-owned business.” *See* Dkt. 58, Second Amended Class Action Complaint (“SAC”). Matterport promised to MSPs that it would provide filtered leads and additional support and services. *See, e.g.,* SAC, ¶¶ 31, 34.

Plaintiff Shawn Lynch (“Lynch” or “Plaintiff”) relied on Matterport’s promises of a lucrative business opportunity through its Matterport Service Partner (“MSP”) program. Plaintiff applied online to become an MSP, fulfilled the requirements to become an MSP, agreed to the terms of service of the MSP program, and became an MSP. Contrary to Matterport’s arguments, the evidence supports that Plaintiff became an MSP, not his company, I.C. Progress, Inc. (“I.C. Progress”). At the very least, there is a genuine issue of material fact regarding who was the MSP, as Matterport’s own corporate witness could not tell from the MSP application fields which field indicates the name of the MSP. Further, Matterport was targeting *individuals*, such as Plaintiff, for the MSP program with promises that they could be their *own* boss and have their *own* business.

Plaintiff suffered injuries from Matterport’s competing with him by selling cameras to potential leads and taking scanning business through its Capture Services program. This conduct was in breach of the implied covenant of good faith and fair dealing in the MSP contract. Matterport took one of Plaintiff’s best clients, Cushman & Wakefield (“C&W”), and Plaintiff lost income from losing C&W as a client. This conduct caused injury to Plaintiff separate and apart from the injury suffered by I.C. Progress.

The injunctive relief requested for Defendant’s breach of the implied covenant of good faith and fair dealing would not, on its face, violate the Sherman Act. A jury will be required to perform a fact-intensive inquiry in order to determine the antitrust implications of such relief. Plaintiff’s breach of the

1 implied covenant of good faith and fair dealing is not barred by the Sherman Act as a matter of law, and
 2 summary judgment is inappropriate.

3 Plaintiff withdraws his claims for violations of California’s Seller Assisted Marketing Plan Act
 4 (“SAMP Act”), Unfair Competition Law (“UCL”), and False Advertising Law (“FAL”).

5 **II. STATEMENT OF ISSUES TO BE DECIDED**

- 6 • Whether Plaintiff individually suffered injury and has standing for his breach of the implied
- 7 covenant of good faith and fair dealing claims.
- 8 • Whether there is a genuine issue of fact as to whether Plaintiff or I.C. Progress, is the MSP
- 9 and has a contract with Matterport.
- 10 • Whether Plaintiff, not I.C. Progress, suffered damages from Matterport’s breach of the
- 11 implied covenant of good faith and fair dealing.
- 12 • Whether Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing
- 13 based on Matterport’s operation of its Capture Services program is barred, as a matter of
- 14 law, by the Sherman Act.
- 15
- 16

17 **III. SUMMARY OF FACTUAL ALLEGATIONS**

18 **A. Plaintiff Shawn Lynch is the MSP, not I.C. Progress**

19 I.C. Progress is the company that Plaintiff created through which Plaintiff provides photography,
 20 video, and 3D documentation services. *See* Dkt. 25-1, Lynch Decl., ¶3. I.C. Progress is an S-corporation
 21 organized under New York law. *Id.*, ¶4. Plaintiff is, and has been since the company was incorporated,
 22 the sole shareholder, sole director, and sole employee of I.C. Progress. *Id.*, ¶5.

24 Plaintiff applied through Matterport’s website to become an MSP. *See* Deposition of Shawn Lynch
 25 taken June 8, 2023 (“Lynch Dep. II”), marked as **Trial Exhibit 170**, at 34:11-35:8. One of the required fields
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1 of information to apply to become an MSP was a business name. *Id.*, at 35:9-15. Lynch understands himself
2 to be an MSP and not his business. *Id.*, at 35:16-24.

3 Daniel Fellars testified as the corporate representative of Matterport regarding, *inter alia*, Plaintiff's
4 MSP application and whether Lynch or IC Progress is the MSP, and how Matterport signed up MSPs and
5 identified the MSP on an account. *See* Fellar's Deposition Exhibit 156 (Amended Notice of Deposition
6 Pursuant to Federal Rule of Civil Procedure 30(B)(6)), marked as **Trial Exhibit 172**; *see also* Deposition
7 Transcript of Daniel Fellars dated June 13, 2023 ("Fellars Dep."), marked as **Trial Exhibit 171**, at 4:7-
8 5:3. The deposition notice requested that the corporate witness bring Lynch's completed MSP application to
9 the deposition. *See* **Trial Exhibit 172**; *see also* Fellars Dep. 5:4-13. Fellars stated there is no paper application
10 to produce, only a "digital transferal of that application which I've been able to identify to the best of my
11 ability." Fellars Dep. 5:7-13. Fellars produced the information Matterport believes was contained within
12 Plaintiff's MSP application, which was in the form of 26 pages of raw HTML code. Fellars Dep. 5:11-13;
13 6:5-10, 6:23-7:6; 7:14-19; 8:10-14, 19:7-24. The HTML code in **Trial Exhibit 173** matches the screen shot
14 of the MSP Apply Today page that is marked as Plaintiff's **Trial Exhibit 33**. Fellars Dep. 9:13-10:4. This
15 shows what Plaintiff would have seen when he applied to become an MSP. Fellars Dep. 10:5-8; 11:11-18.

16 The first heading in the HTML code is "Become a Matterport Service Partner." Fellars Dep. 8:4-9.
17 Underneath the first heading, it states: "Let's capture the world, together. Whether you're an experienced
18 photographer or an entrepreneur looking for a new venture, let us help you build a business using Matterport's
19 industry-leading 3D technology." *See* **Trial Exhibit 173**, at p. 1 (HTML code omitted for ease of reading).

20 The second heading in the HTML code is "Enrollment Requirements." Fellars Dep. 8:4-9. The
21 Enrollment requirements include that the applicant should own a Matterport Pro or Pro2 3D camera and
22 Cloud Service Plan; complete at least one high-quality 3D scan; have a business name, email address, and
23 website; must currently offer, or intend to offer, Matterport 3D scanning as a service; and the business must
24 not be affiliated with a brokerage or real estate company to be eligible for the program. *See* **Trial Exhibit**
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1 **173**, p. 2. The MSP applicant was required to upload a representative sample of his work so that Matterport
2 could take a look at it and make sure the applicant knows what he is doing. Fellars Dep.27:2-6.

3 On page 2 of **Trial Exhibit 173**, within the HTML code, the form is identified as “Matterport Service
4 Partner Program Application.” Fellars Dep. 12:10-13. The first question on the MSP application asked how
5 Matterport should get in touch with the applicant, and it asked for first name, last name, email address, title
6 (optional), and phone number. Fellars Dep. 13:3-12. The MSP application then asked for the four-digit
7 alphanumeric code at the bottom of the camera (also known as the camera serial number), which was a
8 required field. Fellars Dep. 13:13-17. Next, the MSP application provides a field for the applicant to add an
9 example 3D space, which is a required field. *Id.*, 13:16-17. The MSP application then asks the distance the
10 applicant is willing to travel from his business to scan a space, and it has a dropdown box with four option
11 values. *Id.*, 13:18-21. Next, the MSP application asks for a company name, which is a required field. *Id.*,
12 13:22-14:1. The application then asks for the company address. *Id.*, 13:22-14:6. Finally, the application asks
13 the applicant to agree to the service partner terms (which are provided by hyperlink to the “MSP Terms of
14 Service”) by checking a box, and then ends with a submit application button. *Id.*, 13:7-15, 15:7-16:6. Next to
15 the checkbox asking if the applicant agrees to the terms of the MSP, there is no contact name or company
16 name. *Id.*, 30:22-31:24.

17
18
19 Fellar’s Deposition Exhibit 158, marked as **Trial Exhibit 174**, provides some data that Plaintiff
20 inputted into the MSP application that was then inputted into Salesforce, which is the customer relationship
21 management platform used by Matterport.. *Id.*, 20:1-22:5. Fellars could only speculate as to which field in
22 the MSP Application goes into which field in Salesforce. *Id.*, 23:6-22. In the MSP Application (**Trial Exhibit**
23 **173**), the first question asks how Matterport should get in touch with the applicant and provides fields for first
24 and last name, which Fellars believes would have been put into Salesforce (**Trial Exhibit 174**) as the MSP
25 contact name. *Id.*, 23:11-24:8. The Salesforce record includes the MSP email, which is
26 shawn@icprogressphotos.com, and the applicant’s title, which is listed as President. *Id.*, 24:9-11, 26:7-9.

1 Matterport organized its Salesforce data in a hierarchical structure so that the account name, which is
2 the name of the individual's business, is at the top of the hierarchy and the MSP contact information and other
3 data sits under the account name. *Id.*, 33:19-36:17.

4 Significantly, Matterport's corporate representative agreed that every account is going to have a
5 business name and he could not say whether Plaintiff is the MSP or whether I.C. Progress is the MSP. *Id.*,
6 37:1-38:1.

7
8 **B. Matterport Undermined its Own MSPs in Breach of the Implied Covenant of Good
9 Faith and Fair Dealing**

10 Despite promising to support MSPs, Matterport decided to get into the scanning business and
11 compete with MSPs for scanning business using information that it learned from its MSPs. "Lion" was a
12 pilot program that Matterport launched in San Francisco in July 2017, as Matterport was going to get into
13 the scanning business. Johnson Dep. 78:15-79:10; Wilson Dep., 24:12-17; Chen Dep. 32:15-16, 33:16-
14 34:9. "Lion" was the precursor to the Capture Services program that was announced in the Spring 2020.
15 Johnson Dep. 83:13-17; Fellars Dep. 20:1-2. Matterport quickly announced it was withdrawing the pilot
16 program due to backlash from MSPs complaining that Matterport would be directly competing with them
17 if the "lion" program continued. Johnson Dep. 79:11-24, 79:25-80:4; Wilson Dep., 24:20-23; Itskovitz
18 Dep. 54:23-55:16.

19
20 However, Matterport surreptitiously continued to operate the program as part of a business model
21 designed to compete against MSPs. Matterport continued to operate the "lion" program surreptitiously
22 while Matterport continued to enroll people into the MSP program from July 2017 until Dolores Johnson
23 ("Johnson") left Matterport on September 15, 2019, but Matterport was not telling the prospective MSPs,
24 including Plaintiff, about it when Matterport was enrolling them into the MSP program. Johnson Dep.
25 81:11-24, 84:4-13. Wilson told Johnson that it was not something that was public, and to keep it "hush
26 hush." Johnson Dep. 81:25-83:12. Johnson told her manager that "lion" was a conflict of interest with
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1 MSPs and her manager did nothing, and Wilson told her not to talk about it. Johnson Dep. 84:19-85:21.

2 Additionally, in or about February 2019, Matterport surveyed MSPs about what they charged for
3 their scanning services. Matterport then used that information to devise pricing for Matterport Capture
4 Services to the detriment of MSPs, so that Matterport could undercut MSPs' pricing and steal the MSPs'
5 customers. SAC, ¶ 70; *see also* Dkt. 64-2, Plaintiff's Compendium of Facts and Citations to Evidence in
6 Support of Class Certification, at ¶¶ 63, 67.

7
8 Matterport promotes "Matterport Capture Services" on its website and states "Let us capture for
9 you." *See* SAC, ¶ 72 (citing <https://matterport.com/capture-services>). Matterport set the pricing for
10 Capture Service technicians' scans, and Matterport requires that a Capture Services customer purchase a
11 subscription plan—such as a Starter, Professional, or Business plan—or contact Matterport for custom
12 enterprise plans. *Id.*

13
14 After Capture Services was announced, numerous MSPs complained that instead of helping them
15 grow their business as Matterport promised, Matterport developed the Capture Services program and was
16 competing against MSPs by undercutting MSPs' prices. MSPs complained that they lost customers who
17 hired Capture Services technicians instead of MSPs, and that Matterport's Capture Services plans
18 prohibited MSPs' clients from selecting and continuing to do business with their existing MSPs. Dkt. 66-
19 4 (**Trial Exhibit 59**), Dkt. 66-5 (**Trial Exhibit 61**); SAC, ¶¶ 73, 77, 113, 114.

20 Matterport is no longer promoting the use of MSPs and, instead, is promoting Capture Services.
21 Matterport's current "Find a Matterport Service Partner" webpage promotes Capture Services over the
22 MSP program and includes the statement, "...aren't ready to invest in a camera? Try out Matterport's
23 Capture Services. ... If your city isn't in the network, you can check whether there's a Matterport Service
24 partner (MSP) in your local area to scan the property for you." *See*
25 https://support.matterport.com/s/article/Find-a-Matterport-Service-Partner?language=en_US (last
26 accessed Feb. 15, 2023). SAC, ¶ 108. Matterport's current webpage does not promote MSPs and, instead,
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1 includes the statement, “And if you’d rather have someone else do the scanning, we can take care of it
2 for you with Matterport Capture Services.” *See* <https://matterport.com/cameras> (last accessed Feb. 15,
3 2023). SAC, ¶ 109. Matterport promotes Capture Services and does not mention MSPs. *Id.*

4 After the Capture Services program was announced, the number of leads that Plaintiff received
5 dropped to two in 2021, and one of those leads was blank. Plaintiff received no leads in 2022. SAC, ¶ 89.

6 Plaintiff lost one of his best clients—C&W—to Matterport Capture Services. C&W provided
7 approximately 13% of Lynch’s company’s revenue for 2020, and approximately 26% of Lynch’s
8 company’s revenue for 2021. SAC, ¶ 93. In or around January 2022, C&W notified Lynch that they
9 signed up with Matterport Capture Services and would no longer need his services. Lynch lost business
10 as a direct result of Matterport competing against him with its Capture Services program. SAC, ¶ 94.

11 C&W entered into an exclusive agreement with Matterport that requires the use of Matterport
12 Capture Services technicians. Thus, C&W is not given the choice of using an MSP even though C&W
13 was satisfied with Plaintiff’s services.
14

15 **C. Certification of a Rule 23(c)(4) issue Class**

16 The court certified a Rule 23(c)(4) issue class on a single question:

17 This order thus defines the following class: All enrolled MSPs when Matterport
18 launched its Capture Services program. The following issue is certified for class
19 treatment: Whether or not the MSP terms of service prevent a claim for breach of
20 the implied covenant of good faith and fair dealing based on Matterport’s operation
21 of its Capture Services program. If the legal answer is “yes,” then that will be the
end of the implied covenant claim for all.

22 *See* August 16, 2023 Order Re Plaintiff’s Motion for Class Certification, at p. 13.

23 **IV. LEGAL STANDARD**

24 Summary judgment is proper only upon a showing “that there is no genuine dispute as to any
25 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. “Material” for
26 purposes of Rule 56, means that the fact, under governing substantive law, could affect the outcome of
27

1 the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For a dispute to be “genuine,” a
2 reasonable trier of fact must be able to return a verdict for the nonmoving party. *Cline v. Indus. Maint.*
3 *Eng’g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000) (citing *Anderson*, 477 U.S. at 248). “In
4 judging evidence at the summary judgment stage, the court does not make credibility determinations or
5 weigh conflicting evidence.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). “If
6 conflicting inferences may be drawn from the facts, the case must go to the jury.” *LaLonde v. Cnty. of*
7 *Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). Summary judgment must be denied if, when “viewing the
8 evidence in the light most favorable to the non-moving party,” there are genuine issues of material fact.
9 Fed. R. Civ. P. 56(c); *Nolan v. Heald Coll.*, 551 F.3d 1148, 1154 (9th Cir. 2009).

11 **V. ARGUMENT**

12 **A. Plaintiff’s Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**

13 “The law implies in every contract . . . a covenant of good faith and fair dealing. ‘The implied
14 promise requires each contracting party to refrain from doing anything to injure the right of the other to
15 receive the agreement’s benefits....’” *Ghazarian v. Magellan Health, Inc.*, 53 Cal. App. 5th 171, 183
16 (2020), *as modified on denial of reh’g* (Aug. 31, 2020), *review denied* (Nov. 10, 2020) (citation omitted).
17 Allegations of *omissions* can be the basis for a breach of the covenant of good faith and fair dealing. *See*
18 *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 833 (9th Cir. 2018). “The essence of the
19 good faith covenant is objectively reasonable conduct.” *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128, 141
20 (1983). Plaintiff’s actual reliance is not an element of the claim. *Id.*

21 Matterport promised certain MSP program benefits to help MSPs—such as Plaintiff and Class
22 members—be successful. The terms and conditions of the MSP program mention that MSPs would be
23 given leads and marketing assistance, and the necessary implication is that Matterport will not directly
24 compete with MSPs for these potential leads, withhold these leads from MSPs, and conceal that conduct
25 from MSPs. Matterport made omissions of material facts, and unfairly frustrated the purpose of their
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1 agreement by directly competing with MSPs. *See* SAC, ¶¶ 64-77. Matterport promised in bad faith to
 2 facilitate MSPs’ business expansion by providing MSPs with pre-qualified leads, while at the same time
 3 Matterport was directly competing against MSPs for these leads—conduct that it concealed from
 4 prospective MSPs when it enrolled them into the MSP program. SAC ¶¶ 6-7, 11-13, 53-59, 64-77. This
 5 conduct is objectively unreasonable. SAC ¶ 156.

7 **B. Plaintiff Has Standing for His Breach of Implied Covenant of Good Faith and Fair**
 8 **Dealing Claim**

9 With regard to his claim for Breach of Implied Covenant of Good Faith and Fair Dealing, Plaintiff
 10 has sought actual damages, including lost profits for the loss of his client, C&W, to Matterport Capture
 11 Services, punitive damages and injunctive relief. *See, e.g.,* SAC, ¶¶ 14, 95, 162, and Prayer for Relief.
 12 Contract damages seek to approximate the agreed-upon performance. “[I]n the law of contracts the theory
 13 is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of
 14 performance.” *Copenbarger v. Morris Cerullo World Evangelism, Inc.*, 29 Cal.App.5th 1, 9 (2018)
 15 (internal citations omitted). A jury could find that Matterport’s conduct constituted a breach of the implied
 16 covenant of good faith and fair dealing and award lost profits to Plaintiff. *Hewlett-Packard Co. v. Oracle*
 17 *Corp.*, 65 Cal. App. 5th 506, 555, 280 Cal. Rptr. 3d 21, 63 (2021), *reh’g denied* (July 8, 2021), review
 18 denied (Sept. 29, 2021), cert. denied, 142 S. Ct. 2709 (2022) (finding that Oracle’s decision to stop porting
 19 activities, and its subsequent conduct, could properly serve as the basis for the jury to consider breach of
 20 the implied covenant as “contrary to the contract’s purposes and the parties’ legitimate expectations,” and
 21 upholding jury’s damages award of \$3.014 billion for HP’s lost profits).

24 Defendant argues that Plaintiff does not have standing because any injury suffered was allegedly
 25 incurred by I.C. Progress and not Plaintiff personally. *See* Dkt. 89, Defendant Matterport, Inc.’s Motion
 26 for Summary Judgment (“MSJ”), pp. 6-8. Defendant raised this standing argument in its motion to dismiss.
 27 The Court previously rejected Defendant’s argument. *See* Dkt. 34, Order Re Defendants’ Motion to
 28

Dismiss, at p. 12.

Plaintiff has suffered a direct and independent injury from Matterport's fraudulent inducement to become an MSP, which is separate from any injury to I.C. Progress. As the Ninth Circuit has explained:

The fact that these injuries arose from the same conduct as the corporate injuries does not preclude a finding of direct and independent injury to individual plaintiffs for standing purposes. This circuit has held that the same conduct can result in both corporate and individual injuries. *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983); *Marshall v. Kleppe*, 637 F.2d 1217, 1222 (9th Cir. 1980).

Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1319 (9th Cir. 1989).

Defendant's conduct induced Plaintiff to become an MSP, and Defendant's conduct also caused him to lose personal income. Defendant's conduct caused I.C. Progress to lose income, but because it is an S-corporation, that "loss of income" flows directly to Plaintiff via a Schedule K-1. For example, if I.C. Progress had not lost C&W as a customer, I.C. Progress would have had more revenue, and Plaintiff would have had that exact amount of revenue on his personal tax return via a Schedule K-1 from I.C. Progress. Thus, Plaintiff has suffered a direct injury as a result of the loss of business from competition by Capture Services.

Plaintiff's expert, Phillip Allman, has a Ph.D. in economics and has testified in over 800 trials and arbitrations involving the valuation of economic damages. *See* Dkt. 85-1, Report of Plaintiff's Economic Expert, at ¶ 2. Dr. Allman has calculated the economic loss to Plaintiff from Matterport Capture Services competing against him and taking his client, C&W.¹ Dr. Allman states "[t]he present discounted value of Mr. Lynch's economic loss given two future years of lost sales equals \$190,479; given five future years of lost sales equals \$311,416; and given ten years of lost sales equals \$506,066." *See* Report of Plaintiff's

¹ Defendant's expert, Brian Ellman, did not perform a calculation of Plaintiff's economic loss, but rather, provided an analysis based on Plaintiff being returned to the economic position he would have been in had he never having pursued an MSP business. Plaintiff intends to move to bar Mr. Ellman's testimony at trial, as Mr. Ellman rendered no opinions on Plaintiff's lost sales from C&W.

1 Economic Expert, at ¶ 3. The trier of fact will determine whether Matterport breached the implied covenant
2 and, if yes, the number of years of future lost profits that should be awarded.

3 Matterport's focus on the payments for the camera and Matterport Cloud Services is misplaced.
4 Whether the camera and Cloud services were paid by I.C. Progress or Plaintiff is of no significance
5 because Plaintiff is not seeking those costs as damages for breach of the implied covenant of good faith
6 and fair dealing. Plaintiff is only seeking lost sales from the loss of C&W as damages.

7
8 Defendant's authority is distinguishable because they stand for the proposition that a sole-
9 shareholder of company cannot recover damages suffered by the corporation. *See Lee v. U.S. Taekwondo*
10 *Union*, No. 04-00461 SOM-LEK, 2006 WL 319219, at *3 (D. Haw. Feb. 10, 2006) (distinguishing
11 *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439–40 (9th Cir.1979) (an action for an injury to
12 the corporation must be brought by the corporation)); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846
13 (9th Cir.1976) (noting that, under California law, a shareholder may not maintain an action for wrongs
14 suffered by a corporation on the theory that such wrong devalued his stock and the stock of other
15 shareholders); *Erllich v. Glasner*, 418 F.2d 226, 228 (9th Cir.1969) (same). Because Plaintiff is not seeking
16 to personally recover damages for any injury suffered by I.C. Progress, such as the costs for the camera
17 or Cloud Services, the cases relied on by Matterport are distinguishable. Thus, Plaintiff has standing.

18
19 **C. Plaintiff is a Party to the MSP Contract with Matterport**

20 Plaintiff is a party to the MSP contract with Matterport. Plaintiff complied with all the requirements
21 to become an MSP and agreed to the Matterport Service Partner Program Terms and Conditions. *See*
22 Section III.A, *supra*.

23
24 After reviewing Defendant's representations about the MSP program, Plaintiff applied to be an
25 MSP. SAC, ¶82; *see* Dkt. 25-1, Lynch Declaration in Support of Plaintiff's Response in Opposition to
26 Defendants' Motion to Dismiss Plaintiff Shawn Lynch's Amended Class Action Complaint for Damages
27
28

1 (“Lynch Decl.”), ¶2; *see also* Lynch Dep. II, **Trial Exhibit 170**, at 34:12-35:8 (“I applied to be the MSP
2 myself.”).

3 Defendant argues that Plaintiff is not a party to a contract with Matterport because “he personally
4 neither purchased the Matterport camera or the Cloud services plan, nor signed up to be a MSP.” MSJ, p.
5 9. However, Defendant admits that Plaintiff purchased a Matterport camera. *See* Dkt. 61, Defendant’s
6 Answer to Plaintiff’s Second Amended Complaint, ¶ 83 (“Answering paragraph 83 of the SAC, Matterport
7 admits Plaintiff purchased a Matterport Pro2 3D camera on March 28, 2018.”). In any event, the purchase
8 of a Matterport camera and Cloud services by the applicant was not a requirement of the MSP program.
9 Further, *Lynch* applied to be an MSP, fulfilled the requirements to become an MSP, and accepted the
10 terms of the MSP program.
11

12 The MSP Application provided that “the applicant should *own* a Matterport Pro or Pro2 3D camera
13 and Cloud Service Plan.” *See* **Trial Exhibit 173**, p. 2 (emphasis added); *see also* **Trial Exhibit 145**,
14 Matterport’s Response to Interrogatory No. 4 (“To become an MSP one would need to fill out an
15 application; *own* a suitable Matterport camera, a suitable IOS device that can link to the camera and upload
16 to a Matterport cloud account; and a Matterport Cloud Service Plan; and offer or intend to offer Matterport
17 3D scanning as a service.”) (emphasis added). There is no requirement that, to become an MSP, the
18 applicant had to personally purchase the 3D camera and Cloud Service Plan.
19

20 The MSP program Application required that Plaintiff provide the four-digit alphanumeric code for
21 his 3D camera, which he entered and is recorded in Salesforce as camera serial No. U970. Fellars Dep.,
22 26:14-17. Plaintiff also uploaded a representative sample of his work so that Matterport could see that he
23 could complete a high-quality 3D scan. *Id.*, 26:18-27:6.
24

25 Plaintiff complied with the requirements to become an MSP. The Enrollment requirements include
26 that the applicant should own a Matterport Pro or Pro2 3D camera and Cloud Service Plan; complete at
27 least one high-quality 3D scan; have a business name, email address, and website; must currently offer,
28

1 or intend to offer, Matterport 3D scanning as a service; and the business must not be affiliated with a
2 brokerage or real estate company to be eligible for the program. *See Trial Exhibit 173*, p. 2. The MSP
3 applicant was required to upload a representative sample of his work so that Matterport could take a look
4 at it and make sure the applicant knew what he is doing. Fellars Dep.27:2-6. Plaintiff submitted a 3D scan
5 that he himself scanned to demonstrate that he was able to do the work of an MSP. *Id.*

6
7 When Plaintiff applied online to be an MSP, Plaintiff was required to enter the name of his
8 company. Lynch Decl., ¶2; Lynch Dep. II, 35:9-35:24. The MSP Program Terms and Conditions provided
9 that applicants submit business information to Matterport. *See* Dkt. 70-7, Defendant’s Exhibit 214 to its
10 Opposition to Plaintiff’s Motion for Class Certification, at Section 2 - Requirements for Participation in
11 Program; Ongoing Review. Therefore, Plaintiff submitted the name of his company, I.C. Progress, as part
12 of *his* MSP application. The submission of the name of his company on his application as required did not
13 change the fact that Plaintiff was personally applying to be an MSP.

14
15 Plaintiff being the MSP comports with Defendant’s marketing and advertising that promoted its
16 MSP program as a way for individuals to “be your own boss” and create a “lucrative, self-owned
17 business.” SAC, ¶ 36.

18 **D. Plaintiff has Suffered Actual Damages**

19 Plaintiff alleges damages to himself individually from Matterport’s breach of the implied covenant
20 of good faith and fair dealing. Plaintiff alleges lost profits from the loss of his client, C&W, to Matterport
21 Capture Services. SAC, ¶¶ 93-94; *see also Hewlett-Packard Co.*, 65 Cal. App. 5th 506, 555 (awarding
22 lost profits for breach of the implied covenant of good faith and fair dealing).

23
24 As explained above, because Plaintiff is the sole shareholder, sole director, and sole employee of
25 an S-corporation, the exact amount of revenue of I.C. Progress is reported on Plaintiff’s personal tax return
26 via a Schedule K-1. If I.C. Progress had not lost C&W as a customer, I.C. Progress would have had more
27 revenue, which would have been reflected on Plaintiff’s personal tax return. Thus, Plaintiff has suffered a
28

1 direct injury as a result of the loss of business from competition by Capture Services.

2 As explained above, Plaintiff's expert, Dr. Allman, has calculated the economic loss to Plaintiff
3 from Matterport Capture Services competing against him and taking his client, C&W. *See* Dkt. 85-1,
4 Report of Plaintiff's Economic Expert at ¶ 2.

5 Plaintiff also seeks injunctive relief regarding Matterport's Capture Services program.² SAC, p.
6 35, Prayer for Relief, subparagraph g (providing alternative injunctive relief regarding Matterport
7 competing against its own MSPs). The specific injunctive relief can be fashioned later in this litigation.
8 *See, e.g., Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 698-99 (N.D. Cal. 2019) (citing *B.K. by next*
9 *friend Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (finding the plaintiff is not required at the
10 class certification stage to specify the precise injunctive relief he will ultimately seek).

11
12 Matterport argues that Plaintiff cannot show actual damage from any breach of the implied
13 covenant of good faith and fair dealing because I.C. Progress's income from Matterport-related goods and
14 services increased from 2021 to 2022. MSJ, p. 10. Matterport cites no authority for its argument that where
15 a plaintiff has "mitigated and worked for other clients that led to an increase in its revenue and profits"
16 (MSJ, P. 10), that a plaintiff cannot seek lost profits from a breach of the implied covenant of good faith
17 and fair dealing that resulted in the loss of an existing client. Matterport's argument should be rejected.

18
19 **E. Plaintiff's Breach of Implied Covenant of Good Faith and Fair Dealing Claim is Not**
20 **Barred, as a Matter of Law, by the Sherman Act**

21 The terms and conditions of the MSP program mention that MSPs would be given leads and
22 marketing assistance, and the necessary implication is that Matterport will not directly compete with
23

24 ² In *Stemmelin*, the Court noted that "Matterport does not contest that it continues to operate its capture
25 services, its in-house service that performs ostensibly the same function as MSPs." *See Stemmelin v.*
26 *Matterport, Inc.*, No. C 20-04168 WHA, 2022 WL 3226973, at *4 (N.D. Cal. Aug. 10, 2022). The Court
27 found that "Stemmelin has Article III standing to seek an injunction prohibiting Matterport from
28 competing against MSPs for 3D scanning business." *Id.*

1 MSPs for these potential leads, withhold these leads from MSPs, and conceal that conduct from MSPs.
2 Matterport made omissions of material facts, and unfairly frustrated the purpose of their agreement by
3 directly competing with MSPs. *See* SAC, ¶¶ 64-77. Matterport promised in bad faith to facilitate MSPs’
4 business expansion by providing MSPs with pre-qualified leads, while at the same time Matterport was
5 directly competing against MSPs for these leads—conduct that it concealed from prospective MSPs when
6 it enrolled them into the MSP program. SAC ¶¶ 6-7, 11-13, 53-59, 64-77. This conduct is objectively
7 unreasonable. SAC ¶ 156.

8
9 Matterport argues that the MSP Terms and Conditions disclaim any promise of an increase of
10 business or revenue, that the Capture Services program benefits MSPs, and that Plaintiff seeks to modify
11 the contract to add a non-compete provision in violation of the Sherman Act. MSJ, pp. 11-12.

12 In *Stemmelin*, the Court denied a motion for summary judgment on a breach of implied covenant
13 of good faith and fair dealing claim because Matterport’s “no-warranty provision [was] not coextensive
14 with the conduct Stemmelin asserted violates the implied covenant.” *Stemmelin v. Matterport, Inc.*, No.
15 C 20-04168 WHA, 2022 WL 3226973, at *5 (N.D. Cal. Aug. 10, 2022). “When a contract does not
16 expressly permit certain conduct, ‘[d]ifficulty arises in deciding whether such conduct, though not
17 prohibited, is nevertheless contrary to the contract’s purposes and the parties’ legitimate expectations.’”
18 *Id.* (citing *Avidity Partners, LLC v. California*, 221 Cal. App. 4th 1180, 1204 (2013)). The same reasoning
19 compels denial of summary judgment here, because the no-warranty provision does not expressly permit
20 Matterport’s competition with MSPs, and MSPs’ legitimate expectation was that they would not face
21 competition from Matterport for scanning jobs.

22
23 Matterport also argues that MSPs benefit from the Capture Services program because it allegedly
24 creates more demand for MSP services in general, both nationally and locally. MSJ, p. 12. In reality
25 though, Matterport is generating more demand for *Capture Services technicians*, and the majority of MSPs
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27
28

1 are *not* also Capture Services technicians.³

2 In fact, Matterport Capture Services is unnecessary. One of Matterport’s MSP declarants, Dustin
3 Gardner, testified that he “has developed a private network of approximately 140 of Matterport camera
4 owners many of whom are also MSP members. . . .Our network is currently handling a job consisting of
5 1,400 scans nationwide for a big box store and our gross receivable are in the seven-figures.” Dkt. 70-16,
6 Gardner Decl. ¶9. While Matterport argues that Capture Services benefits the MSPs, it ignores that without
7 the injunctive relief that Lynch seeks, Matterport can enter into a Capture Services agreement with
8 Gardner’s “big box store” customer⁴ and take away the seven-figures of scanning work from these MSPs.
9 Lynch seeks injunctive relief so that the Capture Services program cannot take clients away from MSPs.
10

11 Lastly, an injunction against Matterport to prevent it from competing against MSPs does not
12 violate the Sherman Act, as a matter of law. In general, cases involving the Sherman Act relate to
13 restrictions upon competition that fall within two distinct categories: (1) horizontal restrictions, which
14 affect competition at the same level of a supply chain, such as price-fixing agreements between two
15 competing retailers of the same product; and (2) vertical restrictions, which affect conduct at different
16 levels of a supply chain, such as where a manufacturer sets a minimum price at which retailers may sell a
17 particular product. *See, e.g., Frame-Wilson v. Amazon.com, Inc.*, 591 F.Supp.3d 975, 986 (W.D. Wash.
18 2022) (citing *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015))
19 (discussing the difference between horizontal and vertical restrictions).
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25 ³ There are 2,647 MSPs, 144 Capture Services technicians, and only 107 of those Capture Services
26 technicians are also MSPs. *See Trial Exhibits 163, 165, 166* (Dkts. 72-9, 72-11, 72-12).

27 ⁴ Notably, Gardner does not state the “big box store” customer by name, perhaps to prevent Capture
28 Services from stealing it as a customer.

1 As courts have frequently observed, horizontal restrictions are “inherently anticompetitive.” *E.g.*,
2 *In re Musical Instruments*, 798 F.3d at 1191. Accordingly, horizontal restrictions are *per se* illegal under
3 the Sherman Act. *Id.*

4 Vertical restrictions, in contrast, are subject to the less-stringent “rule of reason” analysis, under
5 which “courts examine ‘the facts peculiar to the business, the history of the restraint, and the reasons why
6 it was imposed,’ to determine the effect on competition in the relevant product market.” *Frame-Wilson*,
7 591 F.Supp.3d at 986 (quoting *In re Musical Instruments*, 798 F.3d at 1191-92). This is because, as courts
8 have repeatedly noted, vertical restrictions “may have procompetitive justifications that benefit
9 consumers.” *In re Musical Instruments*, 798 F.3d at 1191 (citing *Leegin Creative Leather Products, Inc.*
10 *v. PSKS, Inc.*, 551 U.S. 877, 889-92 (2007)).

12 For example, although vertical restrictions setting minimum prices at which retailers may sell a
13 given product may “eliminate intrabrand price competition” between retailers of that particular product,
14 this lack of price competition encourages retailers to differentiate themselves in other ways and “invest in
15 tangible or intangible services” that results in a net benefit for consumers. *E.g.*, *Leegin*, 551 U.S. at 890-
16 92. In addition, vertical restrictions “can stimulate interbrand competition—the competition among
17 manufacturers selling different brands of the same type of product—by reducing intrabrand competition—
18 the competition among retailers selling the same brand,” which is also a boon to consumers. *E.g.*, *Leegin*,
19 551 U.S. at 890-92 (discussing the ways in which reduced intrabrand competition, and increased
20 interbrand competition, benefit consumers). Indeed, “the primary purpose of the antitrust laws is to protect
21 interbrand competition,” even when it comes at the expense of intrabrand competition. *See, e.g.*, *State Oil*
22 *Co. v. Khan*, 522 U.S. 3, 15 (1997); *Leegin*, 551 U.S. at 890; *see also*, *JBL Enterprises, Inc. v. Jhirmack*
23 *Enterprises, Inc.*, 698 F.2d 1011, 1015 (9th Cir. 1983) (“While vertical restrictions reduce[] intrabrand
24 competition, they ha[ve] redeeming virtues in that they tend[] to promote interbrand competition.”)
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26
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1 One common category of vertical restrictions are exclusivity agreements, such as where a
2 manufacturer grants a distributor the right to be the exclusive supplier of a given product to all retailers in
3 a certain territory, or where a manufacturer limits the number of retailers that may sell a particular product
4 in a geographic area. *See, e.g., Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 721 (1988); *Cont'l*
5 *T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 38 (1977). Since these types of exclusivity “arrangements
6 have recognized economic benefits and pro-competitive effects and generally pose little threat to
7 competition,” they are typically permissible, and only violate [the Sherman Act] when used by a dominant
8 supplier of a product or service to unreasonably deprive other suppliers of a market.” *E.g., Aerotec Int’l,*
9 *Inc. v. Honeywell Int’l, Inc.*, 4 F.Supp.3d 1123, 1135 (D. Ariz. 2014) (*aff’d*, 836 F.3d 1171 (9th Cir.
10 2016)); *Sylvania*, 433 U.S. at 59; *see also, JBL Enterprises*, 698 F.2d at 1015 (noting that “generally,
11 manufacturers are free to impose vertical territorial restrictions”); *Leegin*, 551 U.S. at 903 (“A
12 manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its
13 goods in a given region.”).

14
15
16 Here, although the injunctive relief requested by Plaintiff would (somewhat) limit Matterport’s
17 ability to participate as a retailer in the market for 3D scanning services by preventing it from competing
18 against MSPs⁵, it would be functionally no different from a vertical exclusivity restriction, which is
19 typically deemed permissible. *See, e.g., JBL Enterprises*, 698 F.2d at 1015; *Leegin*, 551 U.S. at 903. This
20 is particularly true given that the injunctive relief requested herein would only limit Matterport’s ability
21 to *directly* compete with MSPs, as opposed to completely barring Matterport from the relevant
22 marketplace.
23

24
25
26
27 ⁵ Not every 3D camera owner is an MSP, so even if the injunctive relief were granted, Matterport could
28 still compete in the market for scanning services.

Moreover, as noted above, any harms associated in the reduction in *intra*brand competition for Matterport’s 3D scanning services would likely be outweighed by the benefits of increased *inter*brand competition for 3D scanning services at large. *See, e.g., Leegin*, 551 U.S. at 890-92. In other words, there is no reason to believe that the injunctive relief requested herein is categorically bad; it very well could (and likely would) be beneficial to consumers.

Finally, even to the extent that the requested injunctive relief would have horizontal effects—by eliminating a competitor in the marketplace for 3D scanning services—it would still be categorized as a vertical restriction. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 (9th Cir. 1986) (noting that “restrictions imposed in the context of dual distributorships”—*i.e.*, where “a manufacturer operates at two distinct levels of the distribution chain in the same market by acting as both a supplier and a distributor of its own products”—are vertical restrictions “and analyzed[] under the rule of reason”). Indeed, it is well-settled that “a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement,” which would *not* be the case here. *See, e.g., PowerTV Media, LLC v. St. Racing DigNight, LLC*, 2017 WL 5665013, at *8 (C.D. Cal. 2017) (quoting *Sharp*, 485 U.S. at 730, n. 4).

In sum, while the injunctive relief requested in this case⁶ may implicate the Sherman Act, it would not clearly violate it. As such, a jury will be required to engage in the fact-intensive rule of reason analysis to determine whether, on balance, the requested injunctive relief would be permitted under the Sherman Act.⁷ *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1386 (9th Cir.

⁶ The Court can fashion the appropriate remedy and injunctive relief later, after the fact-intensive inquiry under the Sherman Act. At a minimum, the injunction should prohibit Matterport from trying to steal away the MSPs’ existing clients, which may require that MSPs identify their existing clients to Matterport to the extent Matterport does not already know who their existing clients are.

⁷ In performing this analysis, it may also be helpful to allow the jury to consider the anti-competitive implications of Matterport’s ability to first set, and then undercut, the market for its 3D scanning services. Specifically, Matterport—as the supplier of the 3D cameras and Cloud Service Plans that must be

1 1984) (rule of reason analysis conducted by jury). Thus, given these issues, Matterport's motion for
2 summary judgment should be denied.

3 **VI. CONCLUSION.**

4 For the foregoing reasons, Plaintiff asks the Court to deny Matterport's Motion for Summary
5 Judgment.
6

7 Respectfully submitted,
8

9 Dated: October 19, 2023

By: /s/ Thomas A. Zimmerman, Jr.
Thomas A. Zimmerman, Jr.

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25 purchased to in order join the MSP program—controlled the costs of MSPs' entry into the marketplace
26 for 3D scanning services, which, in turn, increased the minimum prices that MSPs could charge their
27 customers (if they wanted to recoup their investments). **Trial Exhibits 27, 28, 33** (Dkts. 66-1, 66-2, 66-
28 3); Fellars Dep. 40:12-41:8, 43:12-20, 44:14-45:9; Itskovitz Dep. 27:2-8; **Trial Exhibit 156** (Dkt. 66-11),
Matterport's Resp. to Req. for Admission No. 20. But then, Matterport entered that same market, in direct
competition with its own MSPs, and undercut the very prices that Matterport itself influenced.

PROOF OF SERVICE

I, Thomas A. Zimmerman, Jr., declare as follows:

I am employed in the County of Cook, State of Illinois. I am over the age of 18 and not a party to this action. My business address is 77 West Washington Street, Suite 1220, Chicago, Illinois 60602. October 19, 2023, I instituted service of the following document described as:

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT MATTERPORT, INC.'S
MOTION FOR SUMMARY JUDGMENT**

on the following parties:

Counsel for Defendant

Michael K. Johnson
LEWIS BRISBOIS BISGAARD
& SMITH LLP
2185 North California Boulevard, Suite 300
Walnut Creek, CA 94596
Michael.Johnson@lewisbrisbois.com

Jon P. Kardassakis
Eleonora Antonyan
LEWIS BRISBOIS BISGAARD
& SMITH LLP
633 West 5th Street, Suite 4000
Los Angeles, CA 90071
Jon.Kardassakis@lewisbrisbois.com
Eleonora.Antonyan@lewisbrisbois.com

In the following manner as described below:

☒ Submitting an electronic version of the documents via portable document format (PDF) to the court at <https://ecf.cand.uscourts.gov>.

Service will be deemed effective as provided for by Civil Local Rule 5-1 of the District Court of California, Northern District.

I certify under penalty of perjury that the foregoing is true and correct.

Executed October 19, 2023, at Chicago, Illinois.

/s Thomas A. Zimmerman, Jr.
Thomas A. Zimmerman, Jr.